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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 BETTY MOON

10 Plaintiff,

11 v.
12 UNITED STATES OF AMERICA,
13 Defendant.

14 NO. CV-06-0328-EFS

15 **ORDER ENTERING THE
16 COURT'S RULINGS FROM
17 JULY 24, 2008 HEARING**

18 A hearing occurred in the above-captioned matter on July 24, 2008,
19 in Spokane. Amos Hunter and Geoffrey Swindler appeared on behalf of
20 Plaintiff Betty Moon; Andrew Biviano appeared on behalf of Defendant
21 United States of America. Before the Court was Defendant's Motion for
22 Summary Judgment. (Ct. Rec. 18.) After reviewing the submitted material,
23 relevant authority, and hearing oral argument, the Court was fully
24 informed and granted Defendant's motion. This Order serves to
25 memorialize and supplement the Court's oral ruling.

26 **I. BACKGROUND**

27 On June 27, 2003, Plaintiff entered Glacier National Park
28 ("Glacier") accompanied by her mother, daughter-in-law, and grandson.
29 That afternoon, the family went to the beach in front of Lake McDonald
30 Lodge. Plaintiff sat directly under a Black Cottonwood tree conversing

1 with other park patrons and watching her grandson play near the lake.
2 (Ct. Recs. 44 at 3; 34 at 2.) At approximately 4:00 p.m., a large
3 branch broke off the Black Cottonwood tree and struck Plaintiff; she
4 sustained fractures to her skull and vertebrae in her cervical, thoracic,
5 and lumbar regions. *Id.*

6 Glacier covers approximately 1,600 square miles in northwestern
7 Montana. The park is managed by the National Parks Service ("NPS"), an
8 agency within the Department of the Interior. (Ct. Rec. 44 at 2.) NPS'
9 mission, as statutorily defined in the Organic Act, is to

10 "promote and regulate the use of the . . . national parks . . .
11 . to conserve the scenery and the natural and historic objects
12 and the wildlife therein and to provide for the enjoyment of
the same in such manner and by such means as will leave them
unimpaired for the enjoyment of future generations."

13 16 U.S.C. § 1. Glacier's operations are governed by three (3)
14 policies: the first is NPS' *Management Policies 2001*, which delineates
15 the visitor safety policy for all National Parks; the second is the
16 Natural Resources Management Guidelines ("NPS-77"), which contains a
17 "Hazardous Tree" section that "provides the foundation for each park to
18 implement its own hazardous tree management plan"; and the third is
19 Glacier's Hazard Tree Management Plan ("HTMP"), which tailors the NPS-77
20 hazard tree management recommendations to Glacier's individualized needs.
21 (Ct. Recs. 25-3 at 28; 40-1 at 2, 9.)

22 Under the HTMP, Glacier is divided into four (4) area types:
23 natural, developed, historic, and special use. (Ct. Rec. 44 at 4.) The
24 Lake McDonald Lodge area - where the accident occurred - is classified
25 as a developed area. *Id.* Developed areas are the park areas most

1 frequently occupied by visitors and employees and, consequently, are
2 given highest priority for visitor safety. The practical effect is that
3 developed areas are surveyed for hazardous trees more frequently than
4 lower priority zones. *Id.* There are six (6) developed zones in Glacier,
5 which comprise approximately 20,000 acres of parkland containing many
6 thousands of trees. *Id.*

7 The HTMP mandates that the NPS conduct annual surveys of developed
8 areas to identify hazardous trees. (Ct. Rec. 44 at 4.) The two (2)
9 survey types utilized to identify potentially hazardous trees are the
10 surveillance survey and the examination survey.

11 The surveillance survey is a generalized method of detecting
12 potentially hazardous trees and is administered by walking or driving
13 through an area and visually scanning the forest for trees that exhibit
14 signs of tree failure. (Ct. Rec. 40-1 at 6.) Potentially hazardous
15 trees are reported to the hazard tree team leader for further inspection
16 through the examination survey. *Id.*

17 The examination survey is a more comprehensive individualized
18 inspection, where each potentially hazardous tree identified in the
19 surveillance survey is carefully surveyed for defects using the Hazard
20 Rating System (HRS). (Ct. Rec. 40-1 at 6, 10.) Through a comprehensive
21 set of techniques, the HRS balances the probability of tree failure, the
22 probability of damage to a target (people/property), the target's value,
23 and the aesthetic, historic, and ecological value of the tree. (Ct. Rec.
24 40-1 at 10.) Trees not designated as hazardous, i.e., those without
25 defects or with defects but not likely to fall, are monitored annually
26 in developed areas to detect any changes in their condition. *Id.* Trees

1 designated as hazardous may be entirely removed, topped, or have
2 defective limbs removed. Alternatively, the site may be closed. *Id.*

3 On May 8, 2003, the hazard tree work team prepared a report after
4 performing a surveillance survey on the trees surrounding Lake McDonald
5 Lodge. (Ct. Rec. 44 at 4.) The team did not designate the subject Black
6 Cottonwood tree as hazardous.

7 II. DISCUSSION

8 A. Standard

9 Before addressing the merits of Defendant's motion, it is necessary
10 to determine what standard applies. There are two types of motions to
11 dismiss challenging subject matter jurisdiction: facial and factual
12 challenges. A facial attack is based on the allegations in the
13 complaint, together with documents attached to the complaint, judicially-
14 noticed facts, and undisputed facts in the record. *Thornhill Publ'g Co.*
15 v. *Gen. Tel & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). A factual
16 attack to subject matter jurisdiction is based on extrinsic evidence
17 apart from the pleadings. *Gould Elecs., Inc. v. United States*, 220 F.3d
18 169, 176 (3d Cir. 2000). Where the jurisdictional issues and substantive
19 issues are so intertwined that the question of jurisdiction is dependent
20 upon the resolution of factual issues going to the merits, courts should
21 consider the motion under the standards for summary judgment. *Thornhill*
22 *Publ'g Co.*, 594 F.2d at 733-34.

23 Here, Plaintiff Betty Moon filed a claim under the Federal Tort
24 Claims Act (FTCA) alleging that Defendant negligently failed to (1)
25 identify and correct a dangerous condition posed by an aging Black
26 Cottonwood tree branch, and (2) warn her of the subject tree's dangerous

1 condition. (Ct. Rec. 2 at 4.) Because Plaintiff's FTCA claims are
 2 intertwined with the jurisdictional question, the Court reviews
 3 Defendant's motion under the summary judgment standard.

4 Summary judgment is appropriate if the "pleadings, depositions,
 5 answers to interrogatories, and admissions on file, together with the
 6 affidavits, if any, show that there is no genuine issue as to any
 7 material fact and that the moving party is entitled to judgment as a
 8 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for
 9 summary judgment, the opposing party must point to specific facts
 10 establishing that there is a genuine issue for trial. *Celotex Corp. v.*
 11 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make
 12 such a showing for any of the elements essential to its case for which
 13 it bears the burden of proof, the trial court should grant the summary
 14 judgment motion. *Id.* at 322. "When the moving party has carried its
 15 burden of [showing that it is entitled to judgment as a matter of law],
 16 its opponent must do more than show that there is some metaphysical doubt
 17 as to material facts. In the language of [Rule 56], the nonmoving party
 18 must come forward with 'specific facts showing that there is a genuine
 19 issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
 20 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in original
 21 opinion).

22 When considering a motion for summary judgment, a court should not
 23 weigh the evidence or assess credibility; instead, "the evidence of the
 24 non-movant is to be believed, and all justifiable inferences are to be
 25 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 26 (1986). This does not mean that a court will accept as true assertions

1 made by the non-moving party that are flatly contradicted by the record.
 2 See *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) ("When opposing parties
 3 tell two different stories, one of which is blatantly contradicted by the
 4 record, so that no reasonable jury could believe it, a court should not
 5 adopt that version of the facts for purposes of ruling on a motion for
 6 summary judgment.").

7 **B. Jurisdiction**

8 Federal courts are courts of limited jurisdiction; as such, they are
 9 empowered to hear only those cases that are within the judicial power of
 10 the United States as defined by the United States Constitution and those
 11 cases authorized by Congress. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d
 12 1163, 1174 (9th Cir. 2002); *Estate of Branson v. Comm'r of Internal Rev.*,
 13 264 F.3d 904, 908 (9th Cir. 2001). Based on these limits, the party
 14 initiating the suit in federal court must affirmatively allege facts in
 15 the complaint demonstrating that the federal court has jurisdiction to
 16 hear the case. *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187, 1189
 17 (9th Cir. 1970).

18 Federal courts generally lack the authority to consider and grant
 19 relief against the United States unless Congress explicitly waives
 20 sovereign immunity. Such a waiver exists under the FTCA where a
 21 plaintiff brings a claim based on a United States employee's negligence.
 22 See 28 U.S.C. §§ 1346, 2671, & 2674.¹ Congress did not, however, waive

24 ¹ 28 U.S.C. § 2674 sets forth, "[t]he United States shall be
 25 liable, respecting the provisions of this title relating to tort claims,
 26 in the same manner and to the same extent as a private individual under

1 immunity when the action complained of is the result of a discretionary
 2 function on the part of a federal agency or an employee of the
 3 government. *Id.* This is known as the discretionary function exception.

4 **C. Discretionary Function Exception**

5 The discretionary function exception bars “[a]ny claim . . . based
 6 upon the exercise or performance or the failure to exercise or perform
 7 a discretionary function or duty on the part of a federal agency or an
 8 employee of the Government, whether or not the discretion involved be
 9 abused.” *Id.* The exception’s purpose is to “prevent judicial ‘second-
 10 guessing’ of legislative and administrative decisions grounded in social,
 11 economic, and political policy through the medium of an act of tort.”
 12 *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (citing *United States*
 13 *v. Varig Airlines*, 467 U.S. 494, 813 (1984)). Accordingly, if the
 14 discretionary function exception applies to the challenged governmental
 15 conduct, the United States retains sovereign immunity, and a district
 16 court lacks subject matter jurisdiction to hear the suit. This is true
 17 even where governmental discretion may have been negligently exercised.
 18 28 U.S.C. § 2680(a); *In Re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir.
 19 1995). The burden of demonstrating the discretionary function
 20 exception’s applicability lies with the United States. *Reed v. U. S.*
 21 *Dep’t of the Interior*, 231 F.3d 501, 503 (9th Cir. 2000).

22 The Supreme Court created a two-part test to determine whether the
 23 discretionary function exception applies. *Berkovitz v. United States*,
 24 486 U.S. 531 (1988). First, a court must determine whether a federal
 25 employee’s action involves “an element of judgment or choice,” i.e., it

26 like circumstances”

1 is discretionary. *Id.* at 536. If it does, then the court must decide
 2 whether that judgment "is the kind that the discretionary function
 3 exception was designed to shield," which "protects only government
 4 actions and decisions based on considerations of public policy." *Id.* at
 5 536-37.

6 **1. Part One - Discretionary Action**

7 Defendant argues that the Court lacks subject matter jurisdiction
 8 because Glacier's policies provide park officials considerable discretion
 9 in how to manage dangerous trees. (Ct. Rec. 20 at 10-12.) Plaintiff
 10 responds that Glacier's governing policies contain mandatory language
 11 directing the NPS to thoroughly inspect all trees in developed areas.

12 Even viewing the evidence in Plaintiff's favor, Glacier's governing
 13 policies are discretionary in this instance. Plaintiff's sweeping
 14 assertion that each of Glacier's governing policies are mandatory is
 15 belied by the specific language in each policy. For example, Management
 16 Policies 2001 states that "[t]hese management policies do not impose
 17 park-specific visitor safety prescriptions. The means by which public
 18 safety concerns are to be addressed is left to the discretion of
 19 superintendents and other decision-makers at the park level." (Ct. Rec.
 20 25-3 at 30.) The NPS-77 states, "[t]he following guidance may be used
 21 in developing a park plan. Each plan must be tailored to a park's
 22 particular requirements . . ." (Ct. Rec. 25-3 at 33.)

23 The Management Policies 2001 and NPS-77's plain language affords
 24 broad discretion for Glacier officials to implement a hazardous tree
 25 management plan according to the park's individualized needs. Nothing

1 binds Glacier officials to implement the generalized schematic for
2 hazardous tree management outlined in the policies.

3 Glacier's third governing policy, the HTMP, does contain a mandatory
4 provision requiring annual surveys of developed zones: "Surveys are
5 conducted annually in the spring, before facilities open." (Ct. Rec. 25-
6 at 46.) Plaintiff interprets this provision to require an
7 individualized examination survey of all trees in developed areas.
8 Incorrect. Whether or not to conduct a more intensive examination survey
9 is dependent upon park employees' discretionary determinations in the
10 surveillance survey. (Ct. Rec. 25-4 at 48.)

11 Here, Glacier employees performed the mandatory annual surveillance
12 survey on May 8, 2003, and did not identify the subject Black Cottonwood
13 tree as potentially hazardous. Because Glacier satisfied the HTMP's only
14 mandatory provision - the surveillance survey -, Glacier employees were
15 not required to perform additional surveying, testing, core sampling, or
16 mitigation in relation to the subject Black Cottonwood tree. Part one
17 of the discretionary function analysis is satisfied because Glacier
18 fulfilled its sole obligation under the HTMP; the remaining policies were
19 discretionary. See *Gaubert*, 499 U.S. at 324.

20 **2. Part Two - Policy Inquiry**

21 Defendant argues that part two is satisfied because Glacier's
22 hazardous tree management decisions require it to balance multiple policy
23 considerations, including cost, public safety, public access, and
24 ecological conservation, all of which are grounded in the Organic Act.
25 (Ct. Rec. 20 at 12.) Plaintiff responds that hazardous tree management
26

1 is part of Glacier's routine maintenance responsibilities and does not
2 involve policy-weighting decisions. (Ct. Rec. 34 at 15.)

3 As stated, Defendant must demonstrate that Glacier's hazardous tree
4 management decisions are "based on considerations of public policy" of
5 the kind that "the discretionary function exception was designed to
6 shield" to satisfy part two of the discretionary function test.
7 *Berkovitz*, 486 U.S. at 536-537. Generally, courts have held that part
8 two of the *Berkovitz* test is satisfied when NPS decisions involve a
9 combination of policy considerations such as safety, aesthetics,
10 environmental impact, and available financial resources. See, e.g.,
11 *TerBush v. United States*, 516 F.3d 1125, 1133-34 (9th Cir. 2008) (finding
12 part two is satisfied where non-routine maintenance decisions implicate
13 a balancing of policy considerations, including safety); *Merando v.*
14 *United States*, 517 F.3d 160, 172, (3rd Cir. 2008) (finding part two is
15 satisfied when the NPS "windshield inspection" program balanced visitor
16 safety, visitor enjoyment, and park conservation); *Kiehn v. United*
17 *States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (finding part two is
18 satisfied when the NPS decision not to post warning signs balanced
19 resource allocation, visitor safety, and scenic preservation); *Autery*
20 *v. United States*, 992 F.2d 1523, 1530 (11th Cir. 1993) (finding part two
21 is satisfied where the government weighed the risk of harm from trees in
22 various locations, the need for other safety programs, the preservation
23 of forest's natural state, and limited financial and human resources).

24 Even viewing the evidence in Plaintiff's favor, part two is
25 satisfied because Glacier employees balanced numerous policy
26 considerations when identifying and mitigating the dangers posed by

1 hazardous trees, including (1) public safety, (2) cost, (3) public
2 access, and (4) ecological conservation. (Ct. Rec. 40-1 at 2, 5, 10.)
3 Plaintiff's reliance on *Terbush*, 516 F.3d at 1133-34, for the proposition
4 that Glacier's hazardous tree management plan is nothing more than
5 routine maintenance devoid of policy weighing decisions is misplaced
6 because the Ninth Circuit specifically noted that maintenance decisions
7 implicating multiple policy considerations, including safety, likely
8 satisfy part two of the *Berkovitz* test.

9 Glacier's hazardous tree management plan involves balancing multiple
10 policy considerations that extend far beyond routine maintenance,
11 including visitor safety concerns, conservation, visitor enjoyment, park
12 access, and cost. (Ct. Rec. 40-1 at 2, 5, 10.) Therefore, part two of
13 the discretionary function test is met and Defendant's hazardous tree
14 inspection, mitigation, and warning decisions are shielded from
15 liability.

16 **III. Conclusion**

17 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion for Summary
18 Judgment (**Ct. Rec. 18**) is **GRANTED**.

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IT IS SO ORDERED. The District Court Executive is directed to:

- (1) enter this Order;
- (2) provide copies to counsel;
- (3) enter judgment for Defendant;
- (4) strike all hearing and trial dates;
- (5) close the file.

DATED this 4th day of August 2008.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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